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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MANUEL BARRIOS, Defendant and Appellant.	E069418 (Super.Ct.No. FSB1401341) OPINION

APPEAL from the Superior Court of San Bernardino County. Harold T. Wilson, Jr., Judge. Affirmed.

Suzanne Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant and appellant, Manuel Barrios, appeals from a judgment entered following a jury conviction for second degree murder, a lesser included offense of murder. (Pen. Code, § 187, subd. (a).)[1] The jury also found true the allegation that defendant personally used a deadly or dangerous weapon, a knife. (§ 12022, subd. (b)(1).) The court sentenced defendant to 15 years to life in prison, plus one year for the weapon enhancement.

Defendant contends the trial court erred by failing to instruct the jury on involuntary manslaughter and by not requiring the prosecution to disclose evidence in the victim's juvenile file. Defendant also requests this court to remand the matter for a mental health diversion hearing under section 1001.36. We reject defendant's contentions and affirm the judgment.

II.

FACTS

On March 19, 2014, around 5:30 p.m., Anthony Fuentes paced outside Muscoy Liquor Store, panhandling for change. Fuentes suffered from a mental illness and had spent time in Patton State Hospital (Patton). Surveillance video taken from the liquor store shows defendant entering the store with his dog while Fuentes is outside the store panhandling. Defendant then exits the store and talks with Fuentes in front of the store

[1] Unless otherwise noted, all statutory references are to the Penal Code.

for a while. About 35 minutes later, defendant is shown in the video outside the store making a call. After the call, Fuentes walks away from the store with defendant and his dog accompanying Fuentes.

Defendant's girlfriend testified that, at around 6:00 p.m., she received a call from defendant asking for the telephone number for the sheriff's department. Defendant told her a friend needed help. At 6:18 p.m. she texted defendant with the requested information.

During the recording of defendant's call to the sheriff's department at 6:27 p.m., defendant stated there was a man next to him who was "going to go hostile any moment" and might be under the influence of drugs. Defendant is heard during the call telling Fuentes he was going to get him help. Defendant advised the dispatcher that Fuentes needs help; "It's bad"; Fuentes could get violent. Defendant asked the dispatcher to send someone as soon as possible.

Shortly thereafter, an eyewitness who was in his car stopped at a nearby intersection, saw defendant and Fuentes fighting in the middle of the street. Defendant had a dog. Defendant was arguing with Fuentes and pushing him towards a field. Fuentes was trying to defend himself as defendant pushed him into the field. The eyewitness then saw Fuentes on the ground while defendant stabbed Fuentes multiple times in the chest and head. The eyewitness ran over to stop defendant.

Meanwhile, a second eyewitness saw the fight while getting gas across the street. The second eyewitness saw defendant's dog attack Fuentes, grabbed a knife, ran over to the dog, and stabbed the dog when it latched onto his foot.

At 6:49 p.m., 911 received a call from defendant's cell phone, during which defendant and Fuentes could be heard speaking to each other. Fuentes said, "F--- off. What are you going to do?" Defendant responded, "I got you out here, motherf----er. I got you now." Fuentes said, "No, what you doing motherf---er, what you doing?" Defendant told Fuentes, "F--- that! You better get the f--- back, motherf---er. . . . Don't make me crazy again, bitch. Don't make me crazy. I'll f---ing slice your ass up, homie." Fuentes sounds as if he is hurt and says, "oh, no, no, oh." Defendant tells Fuentes twice, "I f---ing kicked your ass or what?!" A third person can be heard saying, "Leave him alone." At the end of the call, defendant stated, "This motherf---er . . . comes at me all crazy . . . ."

At 6:53 p.m., 911 received a call from someone reporting seeing a lot of men fighting. The caller said there were initially two men and a dog, and then three more men joined in. One of the men (defendant) had a knife. The other man looked drunk and had a stick. The caller said it looked like defendant stabbed a man while the man was on the ground.

There were numerous people at the scene when the first officer arrived. Fuentes was on the ground bleeding and appeared to have been stabbed multiple times, including sustaining fatal stabs to his heart, lung, and liver. Defendant admitted he had stabbed

Fuentes. There was a knife and a wooden stake on the ground near defendant. Defendant admitted that the knife was his and that he had used it to stab Fuentes.

After waiving his *Miranda*[2] rights, defendant told a detective that, while walking his dog, he stopped at the liquor store to buy beer. Defendant saw Fuentes, whom defendant knew from high school, panhandling. When Fuentes asked for change, defendant told him he did not have any. Defendant tied up his dog and went inside the liquor store to buy beer.

After purchasing beer, defendant sat by Fuentes, drank beer, gave Fuentes a beer, drank another beer, and talked with Fuentes. Fuentes became belligerent and started saying strange things that were threatening. Defendant thought Fuentes was on drugs and was trying to get money for his next fix. Fuentes tried reaching into defendant's pocket. Defendant suggested Fuentes go to the hospital or a treatment facility. Fuentes did not like this suggestion and suddenly stood up.

When defendant called his girlfriend and asked her for the number for the sheriff's department, Fuentes became belligerent. Defendant called the sheriff's department and asked the dispatcher to have someone pick up Fuentes because of his threatening behavior. When Fuentes heard this, he became angry, "flipped out," and tried to get away from defendant. Defendant followed Fuentes across the street. Defendant remained on the cell phone with the sheriff's department so that law enforcement would know where to pick up Fuentes. Defendant's dog was tied around his waist.

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

Fuentes grabbed two large rocks from the field by the street and threw one of the rocks at defendant, hitting him in the face. Defendant grabbed a stick and hit Fuentes on the knee. At one point, defendant and Fuentes were arguing in the street. Defendant said his memory was blurry as to where they were. Defendant believed they went to the field, moved to the street, and then moved back to the field, where Fuentes grabbed the stick and stabbed defendant in the back. Defendant then grabbed his knife and fatally stabbed Fuentes in the back multiple times, including in the heart, lung, and liver.

III.

INVOLUNTARY MANSLAUGHTER INSTRUCTION

Defendant contends the trial court erred in rejecting his request for an involuntary manslaughter instruction. Defendant argues there was substantial evidence supporting the instruction, including evidence showing that defendant acted without intent to kill and with an unconscious disregard for life when he stabbed Fuentes.

A. *Procedural Background*

After the prosecution and defense rested, the court discussed jury instructions. Defendant requested that the court instruct the jury on involuntary manslaughter. The prosecution objected on the ground there was substantial evidence defendant acted with malice and therefore the instruction did not apply. The court denied defendant's request for instruction on involuntary manslaughter. The court, however, granted defendant's request for instruction on voluntary manslaughter, based on self-defense, imperfect self-defense, heat of passion, and sudden quarrel. The jury was also instructed on first and

second degree murder with malice aforethought. (CALCRIM No. 520.) Defendant was convicted of second degree murder.

B. *Duty to Instruct and Standard of Review*

"The trial court has a duty to instruct the jury sua sponte on all lesser included offenses if there is substantial evidence from which a jury can reasonably conclude the defendant committed the lesser, uncharged offense, but not the greater." (*People v. Brothers* (2015) 236 Cal.App.4th 24, 29 (*Brothers*).) "This instructional requirement '"prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither 'harsher [n]or more lenient than the evidence merits.'"' [Citations.]" (*Id*. at pp. 29-30.)

"We review the trial court's failure to instruct on a lesser included offense de novo [citations] considering the evidence in the light most favorable to the defendant [citations]." (*Brothers, supra*, 236 Cal.App.4th at p. 30.)

C. *Involuntary Manslaughter*

The trial court instructed on murder and voluntary manslaughter but not on involuntary manslaughter. Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Malice may be express or implied. It is express "when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature." (§ 188.) It is implied when the defendant engages in conduct dangerous to

human life, "'"knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life."'" (*Brothers, supra,* 236 Cal.App.4th at p. 30, quoting *People v. Bryant* (2013) 56 Cal.4th 959, 965.)

Voluntary and involuntary manslaughter are lesser included offenses of murder. (*People v. Thomas* (2012) 53 Cal.4th 771, 813.) "When a homicide, committed with malice, is accomplished in the heat of passion or under the good faith but unreasonable belief that deadly force is required to defend oneself from imminent harm, the malice element is 'negated' or . . . 'mitigated'; and the resulting crime is voluntary manslaughter, a lesser included offense of murder. ([*People v.*] *Bryant, supra,* 56 Cal.4th at p. 968 ['[a] defendant commits voluntary manslaughter when a homicide that is committed either with intent to kill or with conscious disregard for life—and therefore would normally constitute murder—is nevertheless reduced or mitigated to manslaughter']; *People v. Milward* (2011) 52 Cal.4th 580, 587 ['[m]alice is negated when the defendant kills as a result of provocation or in "imperfect self-defense"']; see § 192, subd. (a) [voluntary manslaughter].)" (*Brothers, supra,* 236 Cal.App.4th at p. 30.)

In contrast to murder and voluntary manslaughter, involuntary manslaughter is an unlawful killing of a human being without malice or mitigated malice. (§ 192.) It is defined in section 192, subdivision (b) as a killing occurring during the commission of "an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, [accomplished] in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b).)

Thus, instruction on involuntary manslaughter as a lesser included offense is required "when a rational jury could entertain a reasonable doubt that an unlawful killing was accomplished with implied malice during the course of an inherently dangerous assaultive felony." (*Brothers*, *supra*, 236 Cal.App.4th at p. 34.) However, "'the existence of "*any* evidence, no matter how weak" will not justify instructions on a lesser included offense . . . .' [Citation.] Such instructions are required only where there is 'substantial evidence' from which a rational jury could conclude" the defendant committed the lesser, but not the greater, offense. (*People v. DePriest* (2007) 42 Cal.4th 1, 50; accord, *Brothers*, *supra*, at p. 34.)

D. *Analysis*

Under the evidence presented in defendant's trial, a rational jury could not have entertained a reasonable doubt that Fuentes's death was accomplished with implied malice during an inherently dangerous assaultive felony. (*Brothers*, *supra*, 236 Cal.App.4th at p. 34.) As the court held in *Brothers*, the trial court appropriately rejected defendant's request for an involuntary manslaughter instruction, because the instruction was not supported by substantial evidence defendant acted without implied malice or without due caution and circumspection.

In *Brothers*, *supra*, 236 Cal.App.4th 24, the defendant was charged with first degree murder, which she committed when she was told the victim had molested her granddaughter. The defendant and others beat and suffocated the victim. The jury was instructed on murder (CALCRIM No. 520), provocation reducing murder to

manslaughter (CALCRIM No. 522), and voluntary manslaughter (CALCRIM No. 570). The defendant was convicted of voluntary manslaughter as a lesser included offense of murder. The court in *Brothers* rejected the defendant's contention that the trial court erred in failing to instruct sua sponte on involuntary manslaughter. (*Brothers, supra,* at pp. 29, 35.)

The *Brothers* court explained that an instruction on involuntary manslaughter is not required sua sponte when "the defendant indisputably has deliberately engaged in a type of aggravated assault the natural consequences of which are dangerous to human life, thus satisfying the objective component of implied malice as a matter of law, and no material issue is presented as to whether the defendant subjectively appreciated the danger to human life his or her conduct posed." (*Brothers, supra,* 236 Cal.App.4th at pp. 29, 35; see *People v. Cook* (2006) 39 Cal.4th 566, 596 ["[The defendant] savagely beat Sadler to death. Because the evidence presented at trial did not raise a material issue as to whether defendant acted without malice, the trial court was not obliged, on its own initiative, to instruct the jury on involuntary manslaughter as to victim Sadler."].)

Defendant argues *Brothers* is distinguishable because, in the instant case, there was substantial evidence of the absence of implied malice. Defendant asserts that such evidence includes evidence defendant made multiple statements suggesting he was unaware of his actions and the risk they posed. He told detectives he could not remember what happened during his fight with Fuentes. He said it was a "blur" and he "blacked out and . . . was turned around doing stuff [he doesn't] normally do." Defendant argues there

was also evidence he drank several beers before the incident, he suffered from a mental illness, and he had skipped some of his medication before the incident. We disagree that this evidence provided substantial evidence of a lack of implied malice. The evidence was insufficient to refute that defendant acted deliberately in subjective conscious disregard of human life.

As in *Brothers*, there was no evidence of an accidental killing, gross negligence or defendant's own lack of subjective understanding of the risk to defendant's life that his conduct posed. (*Brothers, supra*, 236 Cal.App.4th at p. 34.) When Fuentes tried to walk away from defendant, defendant followed him. Defendant became enraged when Fuentes threw a rock at his face and tried to stab him in the back with a stick. Defendant hit Fuentes in his knee with a stick to knock Fuentes to the ground, but he would not go down. Defendant then grabbed his knife, wrestled Fuentes to the ground, and started stabbing him while people yelled at him to get off of Fuentes.

During defendant's recorded 911 call at 6:49 p.m., while defendant and Fuentes were in the open field, Fuentes told defendant, "F--- off. What are you going to do?" Defendant responded, "I got you out here, motherf---er. I got you now." Fuentes replied, "No, what you doing mother f---er, what you doing?" Defendant can be heard saying, "F--- that! You better get the f--- back, motherfucker! . . . Don't make me crazy again, bitch. Don't make me crazy. I'll f---ing slice your ass up, homie." Fuentes then sounds

as if he is hurt and says, "oh, no, no, oh." Defendant then twice tells Fuentes, "I f---ing kicked your ass or what?!"

There is also evidence that two eyewitnesses tried to intervene in the fight. A third person is recorded telling defendant to "[l]eave him alone." The recorded 911 call ends with defendant saying, "This motherf---er . . . comes at me all crazy . . . ." An eyewitness testified it appeared that defendant stabbed Fuentes while he was on the ground helpless.

Defendant admitted during his police interview that he "pretty much" assaulted Fuentes because he threw a rock at him. Defendant said he did not run away from Fuentes after Fuentes hit him with a rock and stabbed him in the back with a stick, because "I wanted justice . . . after he hit me in the freaking face with a rock and he tried picking-pocketing me. . . . I just wanted justice after that. My own street justice. . . . I had a lot of anger, too, to let out and I shouldn't have let it out on him."

Even though defendant said his memory was blurry as to the details of the assault, there is overwhelming evidence defendant had sufficient mental faculties and malice to support his murder conviction. The trial court reasonably found that there was insufficient evidence defendant acted without intent to kill or without conscious disregard for human life. Furthermore, defendant's police interview statements demonstrate that he was fully aware of what he was doing and acted with conscious disregard for the danger his actions posed to Fuentes's life. There is strong evidence defendant intentionally stabbed Fuentes because he became outraged at Fuentes when Fuentes became

belligerent, threw a rock at defendant's face, and stabbed defendant in the back with a stick.

As in *Brothers*, an involuntary manslaughter instruction was unwarranted because the evidence left no room for reasonable doubt that the defendant acted with intent to kill or conscious disregard for human life, and he knew the risk involved to Fuentes when he violently attacked him with a knife. (*Brothers*, *supra*, 236 Cal.App.4th at p. 34; see *People v. Guillen* (2014) 227 Cal.App.4th 934, 1028 [involuntary manslaughter instruction unwarranted when the evidence leaves no room for reasonable doubt that the defendant acted with intent to kill or conscious disregard for human life].) We conclude the trial court did not have a duty to instruct on involuntary manslaughter because there was insufficient evidence supporting the instruction.

IV.

FUENTES'S JUVENILE FILE RECORDS

Defendant contends the prosecutor should have disclosed to the defense whether there was material evidence in Fuentes's juvenile file and, if there was material evidence, it should have been provided to the defense through the juvenile court. Defendant alternatively asserts that the trial court should have held an in camera hearing to determine whether there was material evidence in Fuentes's juvenile file that should have been provided to the defense.

A. *Applicable Law*

The prosecutor's disclosure obligations are governed by statutory procedures and federal constitutional due process rights. Section 1054.1 specifies matters the prosecution must disclose to the defense, including exculpatory evidence and felony convictions of material witnesses. (§ 1054.1, subds. (d), (e); *J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329, 1334 (*J.E.*).) The constitutional disclosure obligations exist independently of the statutory procedures. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 377-378; *J.E., supra,* at p. 1334.)

The constitutional disclosure obligations are delineated in *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny. To comply with the *Brady* constitutional due process requirements, "the prosecution must disclose exculpatory and impeachment evidence that is favorable to the accused and material on the issue of guilt or punishment." (*J.E., supra,* 223 Cal.App.4th at p. 1334.) Evidence favorable to the defendant is "'evidence that the defense could use either to impeach the state's witnesses or to exculpate the accused.'" (*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 51.) "Disclosure may be required even when the evidence is subject to a state privacy privilege, as is the case with confidential juvenile records." (*J.E., supra,* at p. 1335.)

The prosecutor has the duty to learn of any favorable evidence known to those acting on the government's behalf in the case. (*J.E., supra,* 223 Cal.App.4th at p. 1335.) However, the prosecution's duty to inspect for exculpatory and impeachment evidence is

generally limited to materials possessed by those assisting the prosecution, who are connected to the investigation or prosecution of the charges against the defendant. (*Id.* at p. 1335.) The prosecution has the duty to attempt to obtain critical impeachment evidence in records that are reasonably accessible to the prosecution but not to the defense, such as key prosecution witness's criminal history. (*Ibid*.) The prosecution must disclose prosecution witnesses' criminal convictions, pending charges, probation status, acts of dishonesty, and prior false reports. (*Id.* at pp. 1335-1336.)

If a defendant challenges in court the prosecutor's *Brady* disclosure decision, the defendant must show that the prosecutor's omission will deprive the defendant of a fair trial. (*J.E., supra,* 223 Cal.App.4th at p. 1336.) "Although the government's *Brady* obligations are typically placed upon the *prosecutor*, the courts have recognized that the *Brady* requirements can also be satisfied when a *trial court* conducts an in camera review of documents containing possible exculpatory or impeachment evidence." (*J.E., supra,* at p. 1336.)

The defendant's right to a fair trial and the state's interest in confidentiality of files can be properly accommodated through the trial court's in camera review of the files. (*J.E., supra,* 223 Cal.App.4th at p. 1336; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 59-61.) The defendant must make a threshold showing of materiality to trigger the trial court's duty to search the file. (*J.E., supra,* at p. 1336; *Pennsylvania v. Ritchie*, *supra,* at p. 58, fn. 15 [petitioner "may not require the trial court to search through the . . . [confidential] file without first establishing a basis for his claim that it contains

material evidence"].) Courts have recognized that in camera inspection is appropriate when there is a "'*special interest in secrecy*'" afforded to the files. (*J.E.*, *supra,* at p. 1336.)

Distinct from prosecutorial disclosure obligations, the Legislature has enacted a statutory scheme governing access to juvenile records. (*J.E.*, *supra*, 223 Cal.App.4th at p. 1337.) The statutory scheme sets forth detailed provisions to protect the records' confidentiality. Welfare and Institutions Code section 827 specifies who is authorized to inspect the files. The prosecutor is listed as one of the authorized persons. An authorized person may not disclose information from juvenile files to an unauthorized person without a court order. (*J.E.*, *supra*, at p. 1337; Welf. & Inst. Code, § 827, subd. (a)(4), (5).)

Welfare and Institutions Code section 827 also permits unauthorized persons to directly petition the juvenile court for access to the confidential records. (Welf. & Inst. Code, § 827, subd. (a)(1)(Q); *J.E.*, *supra*, 223 Cal.App.4th at p. 1337.) The juvenile court has "exclusive authority to determine whether and to what extent to grant access to confidential juvenile records" to unauthorized persons. (*In re Elijah S.* (2005) 125 Cal.App.4th 1532, 1541; accord, *J.E.*, *supra,* at p. 1337; see also Welf. & Inst. Code, § 827.) The petitioner is required to make a good cause showing warranting in camera review of the juvenile records. (Cal. Rules of Court, rule 5.552(c)(2); *J.E.*, *supra*, at p. 1337.) The juvenile court is then required to balance carefully the competing interests of the child and other parties to the juvenile court proceedings when making its disclosure

decision, the interests of the petitioner, and the interests of the public. (*J.E.*, *supra*, at p. 1338.)

Defendant argues the balance of interests weighs in his favor because Fuentes is deceased. Regardless, we conclude, as discussed below, there was no error in nondisclosure of Fuentes's juvenile records because there was no juvenile court order to produce the records and the trial court reasonably found that there was no showing there were any juvenile records in existence containing material information regarding Fuentes committing violent acts. Therefore, Fuentes's juvenile records were not relevant and need not be produced.

B. *Procedural Background*

Defendant's first trial ended in a mistrial right after the jury was empaneled, because of the discovery of newly discovered evidence relating to Fuentes. In the course of investigating Fuentes's criminal history, defense counsel discovered that Fuentes had been committed to Patton. Patton records disclosed that Fuentes had additional placements and contacts with law enforcement, which involved acts of violence, threats, and erratic behavior. Defendant's attorney, Michael Holmes, requested a mistrial because he needed more time to investigate. The court granted the mistrial request over the prosecutor's objection on the grounds the defense was based on self-defense and the mental state of the victim at the time of the charged crimes. The newly discovered evidence was relevant to the victim's propensity for violence and his mental health. Holmes asserted the newly discovered evidence would impact the defense's trial strategy.

At the beginning of defendant's second trial, Holmes told the court he believed the prosecution possessed a police report related to a juvenile case involving Fuentes. Holmes made two attempts to obtain Fuentes's records from the prosecution. The first time, the request was served on the prosecution but was not processed. Holmes made a second request and filed "the documents" with the juvenile court.

Holmes told the trial court that he "was informed at one point that all of the agencies had responded indicating there were no records in existence, and then was also informed that it was one last agency that had not responded and was informed by the juvenile [court] clerk that they would follow up with an additional request." Holmes said he assumed this was done. He further stated that, "at some point," he received notice from the juvenile court "indicating there were no juvenile records in existence."

In response, the prosecutor, Nelson Ng, told the trial court that, after the previous mistrial, Holmes requested to look at reports pertaining to Fuentes. Ng therefore sent an e-mail request to a police detective, who sent Ng two police reports. One was a report regarding prosecution of Fuentes as an adult (San Bernardino County case No. 2009 11286). Ng provided the police report to Holmes. The case involved Fuentes using a pitchfork against a family member. The second report was a 2007 case, during which Fuentes was a minor. Ng therefore did not provide the report to Holmes but told him on October 26, 2016, that the case involved a second degree burglary in which Fuentes entered a store to steal something. It was not a crime of violence. Ng told the court he received a few other reports from juvenile probation, but he could not turn them over to

Holmes. They concerned Fuentes's placement in homes. Ng said that was all he had. He did not have any other reports from the police regarding Fuentes that he could turn over.

Holmes told the trial court that the Patton records indicated that when Fuentes was a juvenile, he stabbed a brother with a pitchfork, cut another brother's throat, and choked his mother. Ng had not given Holmes reports regarding these incidents. The juvenile court said it had no records of these incidents. Ng said he had asked the San Bernardino Police Department for records relating to the incident in which Fuentes stabbed his brother. Fuentes was a minor at the time. The police department said there was a 2008 mayhem case in which Fuentes cut the victim's throat, but the police department did not have any record, either because it did not occur within their jurisdiction or it was a juvenile case. The trial court noted that Holmes had petitioned the juvenile court for records and received negative responses indicating there were no outstanding cases. Nevertheless, the trial court urged counsel to work together to determine whether there were any additional records.

Later in the proceedings, the prosecution moved to exclude character evidence regarding Fuentes, including evidence of his previous incidents of violence. Ng argued the evidence was not relevant because Fuentes's violence involving family members was not relevant to defendant's state of mind regarding Fuentes's propensity for violence. Holmes responded that defendant was willing to testify that he knew Fuentes from the streets and was aware Fuentes had a propensity for violence. Defendant was aware of the

pitchfork incident of violence involving one of Fuentes's brothers, an incident in which Fuentes cut another brother's throat and assaulted his mother. The trial court ruled that it would delay ruling on the prosecution's motion to exclude the evidence until the evidence was presented to the jury. The court added that it believed the evidence was relevant but would consider in the future its admissibility under Evidence Code section 352.

During the trial, Fuentes's brother, Victor, testified that Fuentes was arrested, suffered from a mental illness, and was admitted to Patton. Victor said he was not aware of the specifics of any violent incidents. After the prosecution rested, Holmes put on the record that he had requested copies of police reports and any other discoverable reports relating to Fuentes. Holmes followed up on his documents request. The juvenile court indicated there were no such records. Holmes only had a copy of the police report regarding the pitchfork incident, which occurred when Fuentes was no longer a minor. Ng noted that defendant could call Fuentes's mother to testify regarding the incidents. Holmes said he met with Fuentes's mother and spoke to one of Fuentes's brothers, but they had not been forthcoming.

The trial court stated that it had asked Ng to assist in obtaining the juvenile records, with the understanding confidentiality rules applied to the release of the records. Ng told the trial court he did not have access to any juvenile records. The trial court concluded that Holmes had attempted to obtain the records through the juvenile court, but no such records existed.

C. *Analysis*

The People do not dispute that the prosecution had an obligation to disclose favorable evidence in its possession. The People argue, however, that defendant misconstrued the record in asserting that the prosecutor failed to make the required disclosures.

We conclude the record demonstrates that the prosecutor appropriately disclosed that the only juvenile records in its possession were juvenile probation reports that related to Fuentes's placements in homes and a police report regarding a nonviolent second degree burglary Fuentes committed when he was a minor. The trial court reasonably found that those records did not contain information relating to Fuentes committing any violent acts. The juvenile records therefore did not contain any relevant material or exculpatory information. Furthermore, there was no juvenile court order requiring the prosecutor to provide the defense with Fuentes's juvenile records under Welfare and Institutions Code section 827.

As to the throat cutting incident, the prosecutor disclosed to the defense that there was a mayhem case in which Fuentes cut someone's throat in 2008. The police, however, said they did not have any records regarding the incident. The prosecutor made several requests for Fuentes's records. The record on appeal demonstrates that the requested records do not exist, and that the prosecution fully complied with its records disclosure obligations. The trial court's determination that there were no material records

is consistent with the juvenile court's notice that it requested records from various law enforcement agencies and did not receive any records in response.

Defendant argues the prosecutor stated he had juvenile placement reports, which he refused to turn over, and the prosecution did not say whether those reports contained material evidence. He asserts that there was a reasonable possibility the juvenile placement reports contained material evidence, and the prosecutor did not state whether the reports contained any material evidence regarding violent crimes committed by Fuentes. Defendant adds that the trial court did not make any attempt to determine whether the juvenile placement reports contained material evidence regarding Fuentes committing violent crimes.

When describing the records in the prosecutor's possession, Ng stated that, in addition to the 2007 second degree nonviolent burglary case, there were "a few other reports that I received from juvenile probation. Obviously, I cannot turn them over. It is just reports regarding his placement in the homes. That's all I have, and I don't have any other reports from the police with respect to the victim that can [be] turn[ed] over."

Based on the record, including the prosecutor's representations to the trial court as an officer of the court, the trial court reasonably found that the prosecution did not have any juvenile records containing material information regarding Fuentes committing violent acts. Any contrary conclusion would be speculative. In response to defendant's records requests, the juvenile court stated there were no such records. Therefore, there was no juvenile court order requiring the release of any records or an in camera records

review. Because the record supports the trial court's determination there were no discoverable juvenile records containing material evidence, the trial court did not abuse its discretion in denying defendant's request for an order that the prosecution provide further disclosures or records.

V.

RETROACTIVE APPLICATION OF SECTION 1001.36

Defendant contends section 1001.36, which allows pretrial mental health diversion, applies retroactively to his case.

Generally, pretrial diversion suspends criminal proceedings for a prescribed time period, subject to specified conditions. Criminal charges normally are dismissed if a defendant successfully completes a diversion program. (See §§ 1001.9, 1001.33, 1001.55, 1001.74-1001.75.) Effective June 27, 2018, the Legislature enacted section 1001.36, which authorizes pretrial diversion for qualifying defendants with mental health disorders. Section 1001.36 defines "'pretrial diversion' [as] the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication . . . ." (§ 1001.36, subd. (c).)

A defendant's criminal proceedings may be diverted under section 1001.36, no longer than two years. (§ 1001.36, subd. (c)(1)(B)(3).) If the defendant performs unsatisfactorily in diversion, including committing additional crimes, the court may reinstate criminal proceedings. (§ 1001.36, subd. (d).) If the defendant performs

satisfactorily, at the end of the diversion period, the court shall dismiss the defendant's criminal charges. (§ 1001.36, subd. (e).)

Section 1001.36 authorizes the trial court to grant pretrial mental health diversion if the following criteria are satisfied: (1) the trial court is satisfied, based on evidence from a qualified mental health expert, that the defendant suffers from a recognized mental disorder; (2) the trial court is satisfied the defendant's disorder played a significant role in the commission of the charged offense; (3) in the opinion of a qualified mental health expert, the defendant's mental health symptoms, which motivated criminal behavior, would respond to mental health treatment; (4) the defendant consents to diversion and waives his right to a speedy trial; (5) the defendant agrees to comply with treatment for the disorder as a condition of diversion; and (6) the trial court is satisfied the defendant "will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community." (§ 1001.36, subd. (b)(1)(F).) The trial court must also find that the recommended inpatient or outpatient mental health treatment program will meet the defendant's specialized mental health treatment needs. (§ 1001.36, subd. (c)(1)(A).)

We presume that newly enacted legislation that mitigates or ameliorates criminal punishment, such as section 1001.36, applies retroactively because it "reflects a determination that the 'former penalty was too severe' and that the ameliorative changes are intended to 'apply to every case to which it constitutionally could apply,' which would include those 'acts committed before its passage[,] provided the judgment

convicting the defendant of the act is not final.' [Citation.] [This] rule rests on the presumption that, in the absence of a savings clause providing only prospective relief or other clear intention concerning any retroactive effect, 'a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' [Citations.]'" (*People v. Buycks* (2018) 5 Cal.5th 857, 881-882.)

Section 1001.36 was amended, effective January 1, 2019, to provide that persons charged with certain specified offenses, including murder, are not eligible for diversion. (§ 1001.36, subd. (b)(2), Stats. 2018, ch. 1005, § 1, pp. 6635-6638.)

Although defendant was charged and convicted of second degree murder, he argues the original version of section 1001.36, enacted in June 2018, applies to him retroactively, because he is entitled to the ameliorative benefits of the new diversion provisions. Defendant also argues that the 2019 amendment to section 1001.36, which adds the subdivision (b)(2) murder exclusion, does not apply retroactively to him, because the amendment is not ameliorative and, as applied to him, would have a prohibited ex post facto effect. Defendant asserts that statutory amendments retroactively can reduce punishment but cannot restore it. We disagree.

We assume, without deciding, that the section 1001.36 diversion provisions apply in all cases not yet final. Even so, we conclude the murder exclusion applies to defendant, without violating either ex post facto or retroactivity principles. "[W]hether a new law is being applied retrospectively is closely intertwined with the question whether

it is an unconstitutional ex post facto law, because a finding that the law is being applied retrospectively is a threshold requirement for finding it impermissibly ex post facto." (*In re E.J.* (2010) 47 Cal.4th 1258, 1276.)

"The purpose of the ex post facto doctrine is to ensure fair notice of the conduct that constitutes a crime and of the punishment that may be imposed for a crime. [Citation.]" (*In re Vicks* (2013) 56 Cal.4th 274, 287, fn. omitted.) Thus, "'the operative event for retroactivity purposes, and the necessary reference point for any ex post facto analysis, is criminal conduct committed before the disputed law took effect.' [Citation.]" (*People v. Trujeque* (2015) 61 Cal.4th 227, 256, italics omitted.)

Here, when defendant committed second degree murder, he was not eligible for pretrial diversion because section 1001.36 did not yet exist. He is also not currently eligible for pretrial diversion because of the murder exclusion. Thus, the enactment of the murder exclusion did not change the consequences of his crime as of the time he committed it. Although he was briefly eligible for pretrial diversion under section 1001.36, as originally enacted, this is irrelevant to the retroactivity analysis.

People v. McKinney (1979) 95 Cal.App.3d 712 is instructive here. In *McKinney*, the defendant committed kidnapping to commit robbery with bodily harm, first degree murder, and other crimes, in 1975. (*Id.* at pp. 719, 721, 723, 728.) At that time, the statutory penalty for kidnapping to commit robbery with bodily harm was either death or life imprisonment without the possibility of parole. (*Id.* at p. 745.) The *McKinney*

defendant was tried in 1976 (see *id.* at p. 742) and sentenced to life without the possibility of parole (*id.* at p. 745).

In 1977, the statute was amended so as to reduce the penalty to life imprisonment with the possibility of parole. (*People v. McKinney*, *supra*, 95 Cal.App.3d at p. 745.) In 1978, however, an initiative set the penalty for kidnapping to commit robbery, when committed in the course of first degree murder, as life without the possibility of parole. (*Ibid.*)

The defendant argued that, under the amendment, he was entitled to have his sentence reduced to life with the possibility of parole. (*People v. McKinney*, *supra*, 95 Cal.App.3d at p. 745.) The appellate court did acknowledge that, "[a]bsent compelling proof of a specific legislative intent that a statute reducing the punishment for an offense is only to apply prospectively, such a statute applies retroactively to all convictions lacking finality at the time of the effective date of the ameliorating law. [Citations.]" (*Ibid.*) It held, however, that "the 1978 statute, operative long prior to the finality of this judgment, restored McKinney's original punishment." (*Id.* at p. 746.)

Accordingly, the 2019 amended version of section 1001.36 applies to defendant. Therefore, defendant is ineligible for mental health diversion under the section 1001.36, subdivision (b)(2) murder exclusion, and is not entitled to a remand for consideration of pretrial mental health diversion.

VI.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.